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## Thou Shalt Not Discriminate: The Application of Title VII's Undue Hardship Standard in *Balint v. Carson City*

Polly Hayes

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## Notes

### THOU SHALT NOT DISCRIMINATE: THE APPLICATION OF TITLE VII'S UNDUE HARDSHIP STANDARD IN *BALINT v. CARSON CITY*

#### I. INTRODUCTION

Religious discrimination charges in the work place have risen thirty percent in the last six years.<sup>1</sup> Allegations of religious discrimination involve issues such as restrictive dress codes, prohibitions against bringing religious objects to work and work schedules that conflict with observance of the Sabbath.<sup>2</sup> Many of these complaints are made by members of religious groups who observe their Sabbath from sundown Friday to sundown Saturday and prohibit secular work during that time.<sup>3</sup> Employees are guaranteed freedom from religious discrimination in the workplace by Title VII of the Civil Rights Act of 1964 (Title VII).<sup>4</sup> In addition, Title VII

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1. See Gary T. Pakulski, *Time Off for Sabbath is Becoming a Common Dispute at the Office*, THE GRAND RAPID PRESS, Feb. 21, 1998, at B2 (discussing increase in number of religious discrimination complaints).

2. See Debra Hale Shelton, *Worker's Rites: Religion in the Workplace is a Growing Legal Issue*, THE FORT WORTH STAR-TELEGRAM, May 29, 1999, at 3 (discussing nature of religious discrimination charges); see also Cary v. Carmichael, 908 F. Supp. 1334, 1342 (E.D. Va. 1995) (listing practices employees seek to have accommodated).

3. See Pakulski, *supra* note 1, at B2 (noting that "many disputes . . . center on observance of the Sabbath"). A famous historical example is when pitcher Sandy Koufax refused to pitch a World Series baseball game because it was played on Yom Kippur, a Jewish holy day. See *id.* (relating story of conflict between observance of religious holiday and first game of World Series). The most common place for a Sabbath observance problem to arise is in the employment context. See Alan Reinach, *Why We Need State RFRA Bills: A Panel Discussion*, 32 U.C. DAVIS L. REV. 823, 838 (1999). Government employers are especially prone to allegations of religious discrimination over observance of the Sabbath because they are not as concerned with avoiding the costly litigation that may result from a claim of failure to accommodate and are less motivated to provide accommodation. See *id.* (noting that government employers compose "disproportionate share" of Title VII religious discrimination cases resulting from lower accountability than private sector employers).

Arranging an employee's work schedule around observance of the Friday sundown to Saturday sundown Sabbath creates difficulty for the employer because the Sabbath changes as the seasons change. See *Cook v. Chrysler Corp.*, 779 F. Supp. 1016, 1023-24 (E.D. Mo. 1991), *aff'd*, 981 F.2d 336 (8th Cir. 1992) ("[S]ince plaintiff's Sabbath absences would change seasonally [sic] (even perhaps weekly or monthly as times for sunset and sunrise change), it would be very difficult to schedule other employees to cover plaintiff's absences.").

4. 42 U.S.C. § 2000e(2)(a) (1994). Title VII provides:

It shall be an unlawful employment practice for an employer-(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, condi-

provided for the creation of the Equal Employment Opportunity Commission (EEOC) to devise regulations that would implement the legislation.<sup>5</sup> Religious discrimination, as prohibited by Title VII, encompasses many important and controversial issues, including the definition of religion and the constitutionality and scope of an employer's duty to accommodate.<sup>6</sup> This Note focuses primarily on the scope of the employer's duty to accommodate an employee's religious beliefs and practices.

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tions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

*Id.*; see Laurel A. Bedig, Comment, *The Supreme Court Narrows an Employer's Duty to Accommodate an Employee's Religious Practices Under Title VII*, 53 BROOK. L. REV. 245, 245 (1987) (outlining purpose of Title VII).

5. See Bedig, *supra* note 4, at 245 (discussing creation of EEOC).

6. See 42 U.S.C. § 2000e(1)(j) (1994) ("The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."); see also Garry G. Mathiason et al., *Evaluating and Using Employer-Initiated Arbitration Policies and Agreements: Preparing the Workplace for the Twenty-first Century*, C771 ALI-ABA 241, 328-30 (Aug. 20, 1992) (discussing definition of religion and scope of employer's duty to accommodate). "The United States Supreme Court has defined a religious belief as 'a given belief that is sincere and meaningful [and] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption.'" *Id.* at 328 (quoting *United States v. Seeger*, 380 U.S. 163 (1965)). This is interpreted as including "moral and ethical beliefs that assume the function of a religion in the person's life." *Id.* The employer has a duty to make "reasonable accommodation." See *id.*

Determining whether an employer has the duty to accommodate includes the assessment of many factors. See *id.* at 329 (listing factors: employer's size, nature of employer's business, extent of accommodation required, expense of accommodation, employee notification of employer and "composition and structure of work force"). An employee merely has to inform his or her employer of the conflict with the observance of the Sabbath to satisfy the notice requirement. See *Cary*, 908 F. Supp. at 1344 (noting that informing employer of religious belief satisfies employee's notification burden in Sabbath observance cases).

As religions become more diverse, the term "religion" must be clarified. See Barbara L. Kramer, *Reconciling Religious Rights and Responsibilities*, 30 LOY. U. CHI. L.J. 439, 440-57 (1999) (discussing circular definition of religion under Title VII and criticizing "informal 'know-it-when-I-see-it' analysis"). The definition of religion is broad enough to include atheists and agnostics. See *id.* at 447 ("Religion within the meaning of Title VII is so broad that statutory protection extends to nonbelievers."). See generally Marion K. McDonald, Note, *Establishment Clause Challenge to Mandatory Religious Accommodation in the Workplace*, 36 HASTINGS L.J. 121 (1984) (discussing conflict between employer's duty to accommodate and First Amendment); Gail Westhafer & Kathryn M. Hartrick, Note, *Resolving the Free Exercise and Establishment Conflict in Caldor v. Thornton: Analysis of Legislation Designed to Protect Religious Freedom or Prevent Religious Discrimination*, 35 CASE W. RES. L. REV. 132 (1984) (analyzing Framers' purpose behind First Amendment); Clare Zerangue, Comment, *Sabbath Observance and the Workplace: Religion Clause Analysis and Title VII's Reasonable Accommodation Rule*, 46 LA. L. REV. 1265, 1266 (1986) (discussing constitutionality of Title VII's duty to accommodate employee's religious beliefs).

Title VII establishes the employer's duty to accommodate an employee's religious beliefs, but it does not provide effective guidance in interpreting the scope of that duty.<sup>7</sup> The existence of a valid, neutral seniority system is one factor affecting the scope of the employer's duty to accommodate.<sup>8</sup> Seniority systems are designed to allocate the benefits of employment to employees based on their respective lengths of service.<sup>9</sup> The Supreme Court of the United States examined the effect of a seniority system on an employer's duty to accommodate in *Trans World Airlines, Inc. v. Hardison*.<sup>10</sup> The Court held that the mere existence of a valid seniority system was a significant accommodation of all employees' needs.<sup>11</sup> Since this pro-employer decision by the Supreme Court, the trend in the lower

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7. See Bedig, *supra* note 4, at 246 (noting that "terms 'reasonable accommodation' and 'undue hardship' were left undefined and therefore open to varying interpretations by the courts"); see also Henry Earle III & James R. McPherson, *Religious Discrimination in Employment: Employer's Duty to Accommodate Employee's Refusal to Work Scheduled Hours*, 1987 DET. C.L. REV. 765, 766 (1987) ("[N]either the Act nor the guidelines have provided employers with sufficient practical guidance in determining when and how they must accommodate employees' religious observances, practices, and beliefs."). The Supreme Court has addressed the issue of reasonable accommodation in two decisions, but neither decision gives adequate guidance on the scope of the employer's duty to accommodate. See *id.* at 766 (criticizing Supreme Court for failing to resolve employer's duty to accommodate needs of Sabbath observers).

8. See Cook, 981 F.2d at 338-39 (stating that shift preference is "highly prized aspect of seniority"); see also Colleen Cacy, Note, *Employer's Duty of Reasonable Accommodation Under Title VII—Pinsker v. Joint District No. 28*, 33 U. KAN. L. REV. 583, 585-86 (1985) (noting effect of seniority system on scope of duty to accommodate). The duty to accommodate depends on the "nature and extent of the conflict[ ]" between the needs of the employer and the beliefs of the employee. *Id.* at 585. Factors to consider are: the nature of the employer's business, safety concerns, the willingness of the employer to attempt accommodation and the willingness of employee to cooperate with his or her employer in reaching a solution. See *id.* at 588-89 (discussing analysis of scope of duty to accommodate).

9. See Beth Wain Brandon, Note, *The Seniority System Exemption to Title VII of the Civil Rights Acts: The Impact of a New Barrier to Title VII Litigants*, 32 CLEV. ST. L. REV. 607, 608 (1983-84) (defining seniority systems). A seniority system is a method of allocating benefits of employment. See *id.* ("A seniority system is a scheme or plan which gives increased rights or benefits to employees as their length of employment increases."). Workers value a seniority system because it helps them anticipate employment conditions. See *id.* at 609 ("The most important purpose of seniority systems is the maintenance of a stable work force through realistic employee expectations."). Employees also value seniority systems because they allow more senior workers to enjoy benefits, such as shift preference. See James McCollum, *Title VII v. Seniority: Ensuring Rights or Denying Rights?*, 26 HOW. L.J. 1485, 1487-88 & n.9 (1983) (listing benefits of seniority systems to employees and employers).

10. 432 U.S. 63 (1977). For further discussion of the *Hardison* decision, see *infra* notes 50-63 and accompanying text.

11. See *Hardison*, 432 U.S. at 78 ("[I]t appears to us that the system itself represented a significant accommodation to the needs, both religious and secular, of all of TWA's employees.").

federal courts has been toward more employee-friendly decisions.<sup>12</sup> This trend is exemplified by *Balint v. Carson City*,<sup>13</sup> a recent decision in the United States Court of Appeals for the Ninth Circuit that held a bona fide seniority system is not a complete defense to a charge of religious discrimination.<sup>14</sup>

This Note explores the decision of the *Balint* court. Part II examines Title VII, including the amendments, legislative history, EEOC guidelines and leading case law regarding accommodation of work schedules that conflict with observance of the Sabbath.<sup>15</sup> Part III sets out the facts and history of the *Balint* case.<sup>16</sup> Part IV provides an in-depth analysis of the reasoning employed by the *Balint* court.<sup>17</sup> Part V takes a critical look at the Ninth Circuit's conclusions based on its application of the law to the facts of the *Balint* case.<sup>18</sup> Part VI focuses on the possible impact of the *Balint* decision on future cases involving seniority systems and employee accommodation.<sup>19</sup>

## II. BACKGROUND

### A. Statutory Law—History of Title VII

In 1964 Congress passed Title VII, designed to eliminate racial discrimination in the employment arena.<sup>20</sup> Title VII prohibits an employer

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12. See David M. McIntosh, Note, *Survey: 1994-95 Annual Survey of Labor and Employment Law: Title VII of the Civil Rights Act of 1964*, 37 B.C. L. REV. 353, 361 (1996) (noting increased willingness of Eighth Circuit to find for employee in religious discrimination suit). Title VII was extended to require employers to accommodate religious beliefs in the workplace. See *id.* at 361-62. The Eighth Circuit decision is employee friendly because it broadens the scope of the duty to accommodate. See *id.* at 363 (stating that court interpreted Title VII "more liberally and announced a more permissive standard for public employees' free exercise claims under the First Amendment").

13. 180 F.3d 1047 (9th Cir. 1999). See generally Howard Fischer, *Seniority Can't Overcome Religious Rights*, *Court Rules*, ARIZ. BUS. GAZETTE, June 24, 1999, at 1 (discussing impact of *Balint* decision); Kenneth Ofgang, *METROPOLITAN NEWS-ENTERPRISE*, June 15, 1999, at 1 (examining *Balint* opinion).

14. See *Balint*, 180 F.3d at 1049 ("We hold that the mere existence of a seniority system does not relieve an employer of the duty to attempt reasonable accommodation of its employees' religious practices . . ."). For further discussion of the holding in *Balint*, see *infra* notes 107-26 and accompanying text.

15. For further discussion of this background information, see *infra* notes 20-95 and accompanying text.

16. For further discussion of *Balint*, see *infra* notes 96-106 and accompanying text.

17. For further discussion of the *Balint* court's reasoning, see *infra* notes 107-48 and accompanying text.

18. For further discussion of the *Balint* court's reasoning, see *infra* notes 149-200 and accompanying text.

19. For further discussion of the possible impact of *Balint*, see *infra* notes 201-20 and accompanying text.

20. See Earle & McPherson, *supra* note 7, at 767 (stating that "employer shall not discriminate against any employee in any aspect of employment because of the employee's religion"); see also Mark S. Brodin, *The Role of Fault and Motive in Defin-*

from discriminating against an employee on the basis of race, color, religion, sex or national origin.<sup>21</sup> The original version of Title VII did not include a provision on the lawfulness of seniority systems.<sup>22</sup> Members of both houses of Congress were concerned about the effect Title VII would have on existing seniority systems.<sup>23</sup> As a result, the House of Representatives rejected a proposal that would have made a seniority system an absolute defense to a charge of discrimination.<sup>24</sup> The Senate, however, passed an amendment protecting seniority systems, and this version was subsequently approved by the House and incorporated into Title VII.<sup>25</sup> This section was a political compromise, guaranteeing protection only to employment actions that are taken pursuant to "bona fide" seniority systems.<sup>26</sup> Neither the statutory language nor the legislative history reveals a clear congressional intent regarding a seniority system that is questioned by a Title VII discrimination charge.<sup>27</sup> In contrast, the legislative history reveals a clear congressional purpose behind the inclusion of a definition of religion.<sup>28</sup>

In response to a growing body of case law, Congress amended Title VII in 1972 to include a broad definition of religion.<sup>29</sup> The legislative

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*ing Discrimination: The Seniority Question Under Title VII*, 62 N.C. L. REV. 943, 945 (1984) (discussing purpose behind enactment of Title VII). See generally Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1966) (discussing legislative history of Title VII).

21. See 42 U.S.C. § 2000(e)(2)(a) (1994). For the text of this provision, see *supra* note 4.

22. See Brodin, *supra* note 20, at 949 & nn.29-30 (discussing legislative history of Title VII).

23. See *id.* at 947-48 (discussing concern that Title VII would negatively affect seniority systems in effect before Title VII was passed). The seniority system provision of Title VII has an "unusual legislative history" because it consists of floor debates rather than committee reports. *Id.* at 947 n.17.

24. See *id.* at 948 (reviewing proposals for seniority system provision).

25. See *id.* at 948-49 (discussing legislative history of Title VII); see also 42 U.S.C. § 2000(e)(2)(h) (1994 & Supp. III 1997) (discussing unlawful conduct for employers). Title VII states:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

*Id.*

26. See Brodin, *supra* note 20, 949 & n.30 (asserting that ambiguous language of seniority system provision represents a "political compromise").

27. See *id.* at 949 n.29 (discussing difficulty in determining Congressional intent regarding challenged seniority systems).

28. See Sara L. Silbiger, Note, *Heaven Can Wait: Judicial Interpretation of Title VII's Religious Accommodation Requirement Since Trans World Airlines v. Hardison*, 53 FORDHAM L. REV. 839, 842 & n.29 (1985) (discussing legislative history of amendment adding broad definition of religion to Title VII).

29. See *id.* at 842 & nn.28-29 (noting failure of courts to protect religious beliefs of employees).

history of this amendment reveals its purpose: to protect religious freedom in the work place.<sup>30</sup> Senator Randolph, sponsor of the amendment, expressly referred to the predicament faced by workers who observe the Sabbath from sundown Friday to sundown Saturday.<sup>31</sup> Randolph noted that in private employer settings courts have interpreted Title VII to protect religious beliefs and not religious conduct.<sup>32</sup> In proposing the amendment, he hoped to resolve, through legislative means, a conflict that the courts had left open and to bring the interpretation of religion in Title VII in line with the meaning of religion as used in the First Amendment.<sup>33</sup>

### B. EEOC Guidelines

In 1966, the EEOC adopted recommendations for implementing Title VII.<sup>34</sup> In 1967, the EEOC changed the guidelines to clarify that the employer must reasonably accommodate an employee's religious practices unless the employer can demonstrate that the accommodation would cre-

30. See 118 CONG. REC. 705, 705 (1972) ("[I]t is my desire . . . to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law."). Despite its stated purpose, Title VII is often used to deny employees observance of their religious beliefs. See Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 388 (1997) ("Far from preventing employees from having to choose between their religion and their jobs, as Senator Randolph had hoped, the latter part of section 701 (j) has been used over and over to deny plaintiffs relief."). Courts have undermined the purpose of Title VII by expanding the exceptions to the application of the statute. See *id.* at 432 ("When the definition of religion is broadened, for example, so too is the exception used by courts to obtain the same result.").

31. See 118 CONG. REC. at 705 ("[T]here are several religious bodies . . . denominational in nature—not large in membership, but with certain strong convictions, that believe there should be a steadfast observance of the Sabbath and require that the observance of the day of worship, the day of the Sabbath, be other than on Sunday.").

32. See *id.* (noting that courts have split on issue of whether private employers must accommodate employee's observance of Sabbath). Senator Randolph stated that the Civil Rights Act of 1964 protects religion the same way the First Amendment protects religion. See *id.* (noting that constitutional definition of religion includes "the freedom to believe, and also the freedom to act").

33. See *id.* at 705-06 (stating that proposed Amendment will bring interpretation of Title VII into line with intent of 1964 Civil Rights Act). This amendment was necessary "because court decisions have clouded the matter with some uncertainty." *Id.* at 706. Additionally, the record supports the idea that adding the definition of religion would not violate the First Amendment. See *id.* ("As I read the first amendment of the Constitution, there is no problem here presented by the amendment in connection with the first clause [of the First Amendment] . . ."). For further discussion of the constitutionality of the duty to accommodate, see *infra* notes 88-95 and accompanying text.

34. See Earle & McPherson, *supra* note 7, at 767 (noting affirmative duty to accommodate placed on employer by EEOC guidelines). The employer does not have to accommodate the employee's religious beliefs if it "would create a 'serious inconvenience' to the conduct of the employer's business." *Id.*

ate an undue hardship on his or her business.<sup>35</sup> The guidelines define "undue hardship" as hardship causing accommodation greater than de minimis cost to the employer.<sup>36</sup> The employer must show either that the accommodation would result in a cost that is greater than de minimis, or that the accommodation would require the employer to deviate from a bona fide seniority system in such a way as to deprive other employees of their seniority rights.<sup>37</sup>

Factors to consider when assessing the monetary cost to the employer are the operating costs of the employer, the size of the employer and the number of employees who will require accommodation.<sup>38</sup> The EEOC guidelines differentiate between temporary overtime wages, which are not considered an undue hardship, and long term overtime wages, which are considered an undue hardship.<sup>39</sup> The guidelines also create a presumption that administrative costs, those costs associated with procuring substitutes or switching shifts, do not meet the de minimis threshold.<sup>40</sup> Despite

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35. See *id.* (noting 1967 change to requirement of undue hardship). This duty to accommodate arises after an employee has notified the employer of the need for accommodation of religious beliefs. See 29 C.F.R. § 1605.2(c)(1) (1994) ("After an employee or prospective employee notifies the employer or labor organization of his or her need for a religious accommodation, the employer or labor organization has an obligation to reasonably accommodate the individual's religious practices."). The EEOC guidelines propose some means of addressing the conflict between the employee's religious beliefs and the employer's work demands; this list is not intended to be a complete list. See 29 C.F.R. § 1605.2(d)(1) (1994) ("The following subsections are some means of accommodating the conflict between work schedules and religious practices which the Commission believes that employers and labor organizations should consider as part of the obligation to accommodate and which the Commission will consider in investigating a charge."). The listed alternatives are "voluntary substitutes and swaps," "flexible scheduling" and "lateral transfer and change of job assignments." *Id.*

36. See 29 C.F.R. § 1605.2(e)(1) (1999) ("An employer may assert undue hardship . . . if the employer can demonstrate that the accommodation would require 'more than a de minimis cost.'"). Factors to be considered in assessing cost are "cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation." *Id.* Administrative costs are per se acceptable. See *id.* ("[T]he Commission will presume that generally, the payment of administrative costs necessary for providing the accommodation will not constitute more than a de minimis cost.").

37. See *id.* (defining undue hardship). In assessing the affect of accommodation on the seniority system, the guidelines state that shift swaps that do not infringe on the seniority rights of other employees are not an undue hardship. See 29 C.F.R. § 1605.2(e)(2) (1999) (stating that shift swaps "do not constitute an undue hardship to the extent the arrangements do not violate a bona fide seniority system"). Speculation about future requests by similarly situated employees is not sufficient to prove that accommodation would be an undue hardship on the employer. See 29 C.F.R. § 1605.2(c)(1) (1999) ("A mere assumption that many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship.").

38. See 29 C.F.R. § 1605.2(e)(1) (listing factors).

39. See *id.* (differentiating between temporary overtime and long term overtime costs).

40. See *id.* (stating guidelines for assessing cost of accommodation).



establishing broad recommendations, the EEOC guidelines do not give employers or courts concrete guidance for assessing whether a proposal of accommodation causes undue hardship.<sup>41</sup> Additionally, courts have given the EEOC guidelines less deference than “administrative regulations declared by Congress to have the force of the law.”<sup>42</sup>

### C. *Framework of a Religious Discrimination Claim*

In examining a charge of religious discrimination, courts apply a two-step analysis.<sup>43</sup> First, the court examines whether the employee has established a prima facie case of religious discrimination.<sup>44</sup> This burden includes a showing of three elements: (1) the employee has a bona fide religious belief that is affected by the challenged employment related action; (2) the employer has been notified of the conflict between the religious beliefs and the work demands; and (3) the employee suffered a negative employment action for failure to meet the employer’s work demands.<sup>45</sup> If the employee is successful in establishing a prima facie case, the burden shifts to the employer.<sup>46</sup>

Second, the employer will attempt to rebut the plaintiff’s case by showing a reasonable, good faith effort to accommodate the employee or an inability to accommodate the employee without suffering undue hardship.<sup>47</sup> Due to the lack of express guidance from Congress and the intricacies of each employer-employee relationship, assessing the attempted

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41. See *Cacy*, *supra* note 8, at 587 (“The EEOC guidelines on the subject are helpful, but not comprehensive.”). According to an attorney for the EEOC, the agency is pursuing clarification of the undue hardship standards in the courts. See *Worshippers’ Complaints Increasing in Workplace*, THE FLORIDA TIMES-UNION, Aug. 13, 1999, available in 1991 WL 19077146 (“[I]t’s unclear to what extent an employer has to accommodate an employee’s religious beliefs, and so the agency is giving priority to such cases in hopes the courts will provide answers.”).

42. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70 n.6 (1986). The guidelines are entitled to “some deference.” *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 76 & n.11 (1977); see *Getz v. Pennsylvania*, 802 F.2d 72, 73 (3d Cir. 1986) (rejecting employee’s argument that EEOC regulations should control duty to accommodate). But see *Ansonia*, 479 U.S. at 74 (Marshall, J., dissenting) (criticizing majority for inconsistent application of EEOC guidelines).

43. See *Cary v. Carmichael*, 908 F. Supp. 1334, 1342-43 (E.D. Va. 1995) (noting that Fourth Circuit has never articulated framework for religious discrimination charge and announcing it will follow two-step test used in other circuits); see also *Opuku-Boateng v. California*, 95 F.3d 1461, 1467 (9th Cir. 1996) (citing *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993) (outlining courts’ two-step inquiry in religious discrimination cases)); *Earle & McPherson*, *supra* note 7, at 770 (discussing two-part framework for analyzing charge of discrimination); *Cacy*, *supra* note 8, at 584 (describing shifting burden of proof in discrimination charge).

44. See *Cacy*, *supra* note 8, at 584 (describing employee’s burden of proving prima facie case).

45. See *id.* (listing three elements of employee’s prima facie case).

46. See *id.* (stating that once employee establishes prima facie case, burden of proof shifts to employer).

47. See *id.* at 584-85 (outlining defendant’s requirements for rebutting plaintiff’s prima facie case).

accommodation is a highly fact-sensitive task.<sup>48</sup> Because of the fact specific nature of the claims, courts have interpreted the threshold of undue hardship indifferently.<sup>49</sup>

#### D. Case law

##### 1. *Judicial Interpretation in Trans World Airlines, Inc. v. Hardison*

The leading case analyzing the employer's responsibility to accommodate employees' religious needs is *Hardison*.<sup>50</sup> Hardison worked as an employee in a vital maintenance department of Trans World Airlines (TWA).<sup>51</sup> The department had a bona fide seniority system in place for the purpose of shift bidding.<sup>52</sup> Hardison was a member of the Worldwide Church of God, a church that observes the Sabbath from sundown Friday to sundown Saturday.<sup>53</sup> The conflict arose after Hardison was transferred to a different building where he was too low on the seniority list to bid for a shift that would not conflict with his observance of the Sabbath.<sup>54</sup> After failing to reach an acceptable solution, TWA discharged Hardison for re-

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48. See *id.* at 585 ("Many decisions are restricted to their facts, making this area of the law a difficult one in which to generalize."). For further discussion of fact-sensitive nature of discrimination charge, see *supra* notes 75-80 and accompanying text.

49. Compare *Hudson v. Western Airlines, Inc.*, 851 F.2d 261, 266 (9th Cir. 1988) (holding employer reasonably accommodated employee's religious beliefs by providing flexible scheduling system), and *Turpen v. Missouri-Kansas-Texas R.R. Co.*, 736 F.2d 1022, 1025 (5th Cir. 1984) (finding one and one half hours trying to adjust schedule was sufficient accommodation), with *Edwards v. School Bd. of Norton*, 483 F. Supp. 620, 623-25 (W.D. Va. 1980) (upholding discrimination charge despite fact that employer had history of working around employee's schedule and employee abandoned responsibilities working with handicapped children), and *Brown v. General Motors Corp.*, 601 F.2d 956, 960 (8th Cir. 1979) (finding no undue hardship despite fact that employer was required to use replacement worker every Friday after sundown). See generally *Trans World Airlines v. Hardison*, 432 U.S. 63, 75 & n.10 (1977) (comparing applications among different circuits); *Earle & McPherson*, *supra* note 7, at 778-91 (discussing cases decided according to *Hardison* guidelines); *Bedig*, *supra* note 4, at 246 n.10 (comparing applications of de minimis standard in different circuits); *Silbiger*, *supra* note 28, at 848 (discussing range of decisions resulting from application of *Hardison* de minimis standard).

50. See 432 U.S. 63, 66 (1977); see also *Cacy*, *supra* note 8, at 585 (discussing predominant place of *Hardison* in analysis of religious discrimination cases).

51. See *Hardison*, 432 U.S. at 66 (describing vital nature of Hardison's job). The nature of the work required that the department be fully staffed and operational 24 hours a day, 365 days a year. See *id.* at 66-67 (noting that when Hardison could not fill his position, another worker had to cover for him). Hardison's position was essential to the safe operation of the airline. See *id.* at 80 ("It was essential to TWA's business to require Saturday and Sunday work from at least a few employees even though most employees preferred those days off.").

52. See *id.* at 67 (describing shift-bidding system).

53. See *id.* at 67 (describing Hardison's religious beliefs).

54. See *id.* at 68 (stating facts of case).

fusing to report for his Saturday shift.<sup>55</sup> Hardison filed suit charging TWA with religious discrimination in violation of Title VII.<sup>56</sup>

The Court held that TWA had made reasonable efforts to accommodate Hardison and that TWA was not required to transgress the valid seniority system to reach an accommodation.<sup>57</sup> The Court interpreted Title VII to grant special privilege to the seniority system.<sup>58</sup> In determining that TWA had reasonably accommodated Hardison's request, the Court created the *de minimis* standard: the employer is not required to incur a cost that is greater than *de minimis*.<sup>59</sup> In reaching this decision, the Court expressed concern that making TWA pay additional costs to accommodate Hardison would result in employees receiving unequal treatment because of their religion.<sup>60</sup> The Court also considered the possible negative impact that making this concession would have on TWA, a large employer that could possibly have many more employees wishing to observe the Friday to Saturday Sabbath.<sup>61</sup>

One criticism of the *Hardison* decision is that it does not clarify the scope of the employer's duty to accommodate and in fact "offer[s] little guidance as to how much cost an employer must demonstrate to successfully defend a failure to accommodate."<sup>62</sup> Since the *Hardison* decision,

55. *See id.* at 69 (stating facts of case).

56. *See id.* (describing nature of Hardison's claims against TWA).

57. *See id.* at 79 ("Without a clear and express indication from Congress, we cannot agree with Hardison and the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances.").

58. *See id.* ("[W]e do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement"). Seniority systems often play an integral role in effectuating the national policy of achieving reliable labor agreements. *See id.* (noting importance of seniority system in effectuating national employment policy). The Court read Title VII to provide "special treatment" to seniority systems. *See id.* at 81 ("Our conclusion is supported by the fact that seniority systems are afforded special treatment under Title VII itself."). *See generally* Berta E. Hernandez, *Title VII v. Seniority: The Supreme Court Giveth and the Supreme Court Taketh Away*, 35 AM. U. L. REV. 339, 339-48 (1986) (discussing purpose and practical effects of seniority systems).

59. *See Hardison*, 432 U.S. at 84 ("To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship.").

60. *See id.* ("Like abandonment of the seniority system, to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion."). Paying overtime to another worker may alleviate the necessity of forcing an employee to work a shift he or she does not want to work, but one employee would still enjoy a day off because of his or her religion. *See id.* at 85 ("[I]t would not change the fact that the privilege of having Saturdays off would be allocated according to religious beliefs.").

61. *See id.* at 84 n.15 (stating that dissent "fails to take account of the likelihood that a company as large as TWA may have many employees whose religious observances, like Hardison's, prohibit them working on Saturdays or Sundays").

62. Cacy, *supra* note 8, at 587 (discussing shortcomings of *Hardison* decision). The Court clarified that employers do not have to give preference to one employee at the expense of another, but did not clarify the scope of the duty to accommodate. *See id.* ("[T]he Court did not attempt to define further the 'de

courts have struggled with the application of the de minimis standard and undue hardship test.<sup>63</sup>

## 2. *Effect of Seniority System on Duty to Accommodate*

The first issue courts look at when examining the duty to accommodate is the appropriate amount of deference to be given to a bona fide seniority system.<sup>64</sup> Some courts have followed *Hardison* and held that a seniority system is a "significant accommodation" to an employee's needs, as the United States Court of Appeals for the Eighth Circuit did in *Mann v. Frank*.<sup>65</sup> The employee, Mann, was a Seventh Day Adventist who observed the Friday to Saturday sundown Sabbath.<sup>66</sup> She was one of only eight employees trained in a specific mail sorting scheme at a branch of the United States Post Office.<sup>67</sup> The Post Office had both a seniority system and a voluntary overtime sign up list.<sup>68</sup> When the need for overtime arose on a Friday night shift, Mann was the only employee on the overtime list capable of filling the position.<sup>69</sup> She refused to work and was disciplined.<sup>70</sup> The court held that the seniority system and the voluntary overtime list "represented a nondiscriminatory vehicle for minimizing the number of occasions when an employee would be called upon to work an overtime shift on a day that he or she preferred to have off."<sup>71</sup> The *Mann* court followed *Hardison* when it found that a seniority system alone was "a significant accommodation to the religious needs of employees."<sup>72</sup>

## 3. *Actual Hardship Requirement*

The second issue affecting the duty to accommodate that the lower courts have attempted to clarify is the standard employers must meet to satisfy the duty to reasonably accommodate an employee's religious be-

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minimis' standard, leaving it almost as vague as the 'undue hardship' test . . ."). The *Hardison* decision does not provide much practical guidance for courts assessing an employer's duty to accommodate. See *id.* (stating that *Hardison* Court "offer[s] little guidance as to how much cost an employer must demonstrate to successfully defend a failure to accommodate").

63. For further discussion of issues involved in assessing religious accommodation requirement, see *infra* notes 64-95 and accompanying text.

64. See McCullom, *supra* note 9, at 1519-25 (discussing intensification of conflict between Title VII and seniority systems as economic resources become more scarce). For further analysis of the effect of a seniority system within the framework of Title VII, see *infra* notes 64-72 and accompanying text.

65. 7 F.3d 1365 (8th Cir. 1993). The *Mann* court quoted the *Hardison* Court with approval. See *id.* at 1369 ("The instant case presents a situation analogous to that presented in *Hardison*.").

66. See *id.* at 1367-68 (stating facts of case).

67. See *id.* (describing employee's job).

68. See *id.* at 1367 (explaining employer's seniority system).

69. See *id.* at 1368 (explaining background to charge of discrimination).

70. See *id.* (explaining charge of discrimination).

71. *Id.* at 1369.

72. *Id.* (quoting *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 78 (1977)).

liefs. In *Anderson v. General Dynamics Convair Aerospace Division*,<sup>73</sup> the Ninth Circuit affirmed the reluctance of the lower court to find undue hardship when the employer is predicting future hardships based on speculation about the effects of a proposed accommodation.<sup>74</sup> The court noted the importance of the factual context in analyzing the undue hardship issue.<sup>75</sup> *Anderson* involved a union refusing to accommodate an employee's religious objection to the payment of union dues.<sup>76</sup> The record did not support the union's position that allowing one employee to pay the amount of the dues to a charity, rather than the union, would result in economic trouble and general member unrest.<sup>77</sup> The court rejected the employer's reliance on hypothesis and stated that "[e]ven proof that employees would grumble about a particular accommodation is not enough to establish undue hardship."<sup>78</sup> Regardless of the rejection of employer speculation, the United States Court of Appeals for the Sixth Circuit in *Draper v. United States Pipe & Foundry Co.*,<sup>79</sup> relied on the *Anderson* court and stated that "it is possible for an employer to prove undue hardship without actually having undertaken any of the possible accommodations . . . ."<sup>80</sup>

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73. 589 F.2d 397 (9th Cir. 1978).

74. *See id.* at 402 (citing *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515 (6th Cir. 1975) (noting that "hypothetical hardships" do not rise to level of undue hardship)); *Opuku-Boateng v. California*, 95 F.3d 1461, 1473 (9th Cir. 1996) (stating that possible "morale problems" are not proof of undue hardship); *Haring v. Blumenthal*, 471 F. Supp. 1172, 1182 (D.D.C. 1979) ("[I]t seems to this Court that 'undue hardship' must mean *present* undue hardship, as distinguished from anticipated or multiplied hardship.").

75. *See Anderson*, 589 F.2d at 400 ("These decisions must be made in the particular factual context of each case because the decision ultimately turns on the reasonableness of the conduct of the parties under the circumstances of each case."); *see also* *United States v. City of Albuquerque*, 545 F.2d 110, 114 (10th Cir. 1976) (stating that "undue hardship" is relative term subject to interpretation in accordance with facts of each case).

76. *See Anderson*, 589 F.2d at 399 (stating factual background giving rise to discrimination charge).

77. *See id.* at 402 (rejecting union's argument that *Anderson* would create free rider problem).

78. *Id.*; *see Burns v. Southern Pac. Transp.*, 589 F.2d 403, 407 (9th Cir. 1979) (stating that employer has to show "actual imposition on co-workers or disruption of the work routine"); *Draper*, 527 F.2d at 520 ("The objections and complaints of fellow employees, in and of themselves, do not constitute undue hardship in the conduct of an employer's business.").

79. 527 F.2d 515 (6th Cir. 1975).

80. *Id.* at 520; *see EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 615 (9th Cir. 1988) (holding that employer is not required to take futile action if accommodation would result in undue hardship); *Turpen v. Missouri-Kansas-Texas R.R. Co.*, 736 F.2d 1022, 1027 (5th Cir. 1984) (affirming district court's finding that employer is not required to undertake futile inquiry of employees to determine if employee is willing to swap shifts).

Although the employer does not have to undertake a futile effort, he or she is required to negotiate with the employee. *See EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1513 (9th Cir. 1989) ("[A]t a minimum, the employer was required to negotiate with the employee in an effort reasonably to accommodate the employee's religious beliefs.") (citation omitted).

#### 4. *Safety Considerations Affecting Duty to Accommodate*

Courts have grappled with the possibility of an exception for employers whose function is to provide safety services for their customers or the community.<sup>81</sup> In *Blair v. Graham Correctional Center*,<sup>82</sup> the United States Court of Appeals for the Seventh Circuit considered the staffing difficulties and safety concerns faced by a correctional facility confronted with a request to accommodate the scheduling needs of an employee.<sup>83</sup> The employee, Blair, was a Seventh Day Adventist who observed the Friday sundown to Saturday sundown Sabbath.<sup>84</sup> Blair was eventually discharged for unexcused absences resulting from his refusal to work on the Sabbath.<sup>85</sup> The court stated that the "constraints placed upon Graham by the collective bargaining agreement and the demands of managing the security force of a prison" were the cause of the prison's failure to accommodate Blair.<sup>86</sup> The staffing requirements of the prison in *Blair* are similar to those of the jail in *Balint*.<sup>87</sup>

#### 5. *Constitutionality of Accommodation Requirement*

The fourth issue that courts have addressed in examining the scope of the duty to accommodate is whether the duty to accommodate violates the Establishment Clause found in the First Amendment to the United States Constitution.<sup>88</sup> The Supreme Court has not ruled directly on the constitutionality of the duty to accommodate required by Title VII.<sup>89</sup> The United

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81. For further discussion of safety concerns, see *infra* notes 81-87 and accompanying text.

82. No. 92-1597, 1993 U.S. App. LEXIS 23051, \*1 (7th Cir. 1993).

83. See *id.* at \*1 (stating facts of case).

84. See *id.* at \*1-2 (describing conflict between employee's need for accommodation and employer's need for full staffing at prison facility).

85. See *id.* at \*2 (stating event giving rise to discrimination charge).

86. *Id.* at \*9; see *United States v. City of Albuquerque*, 545 F.2d 110, 114 (10th Cir. 1976) ("In our view when the 'business' of an employer is protecting the lives and property of a dependent citizenry, courts should go slow in restructuring his employment practices.") (quoting *Harper v. Mayor and City Council of Baltimore*, 359 F. Supp. 1187, 1205 (D.C. Md. 1973)); see also *Cacy*, *supra* note 8, at 588 ("An employer whose business . . . operates twenty-four hours a day, has the right to demand more flexibility from his employees than an employer whose business operates during more routine hours.") (footnote omitted).

87. For discussion of facts of *Balint*, see *infra* notes 96-106 and accompanying text.

88. See U.S. CONST. amend. I (stating that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."). For further discussion of the constitutional challenge, see *infra* notes 88-95 and accompanying text. Although religious accommodation statutes have been challenged on this ground, courts have often avoided the question by focusing on statutory interpretation. See McDonald, *supra* note 6, at 123 (discussing tendency of courts to avoid constitutionality issue in Title VII cases).

89. See Zerangue, *supra* note 6, at 1266 (noting that Supreme Court has not directly addressed constitutionality of Title VII). The Court, however, has ruled that a Connecticut statute requiring accommodation was unconstitutional because it did not "call for a balancing of all the interests involved." *Id.* at 1269; see *Estate of*

States Court of Appeals for the Fourth Circuit, however, addressed this issue in *EEOC v. Ithaca Industries*.<sup>90</sup> *Ithaca* involved an employee who refused to work on the Sunday Sabbath.<sup>91</sup> The employee was dismissed after he failed to report for two Sunday shifts.<sup>92</sup> The court rejected a constitutional challenge to Title VII and found that the employer had violated the statute by failing to reasonably accommodate the employee.<sup>93</sup> The court stated that "[e]very court of appeals that has addressed this issue has held that 701(j) does not violate the First Amendment."<sup>94</sup> Title VII does not violate the First Amendment because it is a flexible system involving balancing the needs of employers against the needs of employees.<sup>95</sup>

### III. FACTS OF *BALINT v. CARSON CITY*

In *Balint*, the plaintiff, Lisette Balint, belonged to the Worldwide Church of God.<sup>96</sup> One of the central beliefs of that Church involved a strict observance of the Sabbath from sundown Friday to sundown Saturday.<sup>97</sup> Balint's work schedule conflicted with her observance of the Sabbath.<sup>98</sup> After the City informed Balint that they would not be able to

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Thornton v. Caldor, Inc. 472 U.S. 703, 703 (1985) (holding that state statute requiring accommodation of employee's religious beliefs violated Constitution).

90. 849 F.2d 116 (4th Cir. 1988).

91. *See id.* at 117 (stating facts of case).

92. *See id.* (stating facts of case).

93. *See id.* at 119 (stating holding of case).

94. *Id.* (discussing constitutionality of Title VII); *see* *Protos v. Volkswagen of Am., Inc.* 797 F.2d 129, 136-37 (3d Cir. 1986) (holding Title VII duty to accommodate is constitutional); *McDaniel v. Essex Int'l Inc.*, 696 F.2d 34, 37 (6th Cir. 1982) (holding Title VII accommodation constitutional); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1246 (9th Cir. 1981) (holding that accommodation does not violate Establishment Clause "merely because it can be construed in some abstract way as placing an inappreciable but inevitable burden on those not accommodated"); *Nottelson v. Smith Steel Workers D.A.L.U.*, 643 F.2d 445, 453-55 (7th Cir. 1981) (upholding constitutionality of Title VII). *But see* *Yott v. North Am. Rockwell Corp.*, 428 F. Supp. 763, 765-68 (C.D. Cal. 1977) (holding accommodation requirement of Title VII unconstitutional because of conflict with Establishment Clause of First Amendment).

95. *See* *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 712 (1985) (O'Connor, J., concurring). Justice O'Connor stated:

Since Title VII calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs and practices rather than protecting only the Sabbath observance, I believe an objective observer would perceive it as an anti-discrimination law rather than an endorsement of religion or a particular religious practice.

*Id.*; *see* *Zerangue*, *supra* note 6, at 1282 (concluding that weighing process brings accommodation requirement into compliance with First Amendment principles). For further discussion of cases holding duty to accommodate does not violate the First Amendment, *see supra* note 94 and accompanying text.

96. *See* *Balint v. Carson City*, 180 F.3d 1047, 1049-50 (9th Cir. 1999) (stating background of case).

97. *See id.* at 1049 (describing employee's religious needs).

98. *See id.* at 1049-50 (stating facts of case). After completing the training and testing necessary for a position in the detention department of the Carson City

accommodate her scheduling request, she withdrew her application to the City's Sheriff's Department ("the Department") and filed a claim alleging religious discrimination in violation of Title VII.<sup>99</sup>

The City responded by arguing that "any accommodation, in light of its neutral, shift-bidding seniority system, would be an undue hardship as a matter of law."<sup>100</sup> The seniority system used by the Department was an unofficial policy not mandated by a written contract but adhered to for many years.<sup>101</sup> The Department rejected Balint's offer of a voluntarily shift trade on the basis that voluntary shift trades were allowed only on an emergency basis.<sup>102</sup> The Department also rejected the proposal of split shifts because the Department did not have experience with split shifts and feared that allowing split shifts would cause problems with some contractual provisions.<sup>103</sup>

In deciding the dispute, the district court limited discovery to the narrow question of whether the seniority system in place at the Department was a bona fide seniority system.<sup>104</sup> On this limited record, the district court granted summary judgment for the Department.<sup>105</sup> On appeal, the Ninth Circuit held that using a valid, neutral seniority system to make employment decisions does not obviate the employer's duty to "reasonably accommodate" the religious beliefs of an employee, at least where the ac-

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Sheriff's Department ("the Department"), Balint was directed to report for work on a Friday evening. *See id.* She informed the Department that her religion prohibited secular work during the Sabbath and requested that her schedule be changed. *See id.* (stating that employee put employer on notice of her religious beliefs). She suggested that she work the Friday shift and only take off Saturday or that she work a split shift. *See id.* (describing employee's attempts to negotiate solution to conflict between her religious beliefs and her employer's staffing needs).

99. *See id.* at 1049-50 (stating employee's charge of religious discrimination).

100. *Id.* at 1051.

101. *See id.* at 1050 (describing seniority system as "a longstanding practice of the Department, although not the subject of any written document"). The system employed by the Department was a neutral shift-bidding system. *See id.* (describing seniority system at jail). Every six months employees bid for shifts in order of their seniority. *See id.* Only one shift has both Saturday and Sunday off. *See id.* Employees can not bid for the same shift that he or she is currently working. *See id.*

102. *See id.* ("Similarly, although deputies are permitted to trade shifts for personal emergencies on a one-time basis, there is an unwritten rule prohibiting deputies from trading shifts on a regular basis.").

103. *See id.* at 1056 (stating "department 'could run into problems with the contract' regarding a forty-hour work week") (quoting Deposition of Lt. Dimit, Balint, 180 F.3d 1047 (9th Cir. 1999) (No. 96-17342)).

104. *See id.* at 1050 (stating that district court limited discovery to whether department used neutral shift-bidding system).

105. *See id.* (stating holding of district court). The district court also held that Balint had established a prima facie case of discrimination. *See id.* (reporting district court holding). The court then held that in light of its seniority system, the Department did not have to attempt any accommodation of Balint's religious beliefs. *See id.* A panel of the Ninth Circuit affirmed the district court's decision. *See id.* The Ninth Circuit voted to rehear the case en banc; that decision is the subject of this Note. *See id.* at 1049 n.1.



commodation can be made without impacting the seniority system or imposing a cost on the employer that is greater than de minimis.<sup>106</sup>

#### IV. NARRATIVE ANALYSIS

##### A. Examination of Seniority System as Defense

The *Balint* court began its analysis by examining and rejecting the City's arguments.<sup>107</sup> The City argued that "any accommodation, in light of its neutral, shift-bidding seniority system, would be an undue hardship as a matter of law."<sup>108</sup> The City offered two reasons in support of this position: (1) the plain language of Title VII dictates that a bona fide seniority system is a complete defense to a charge of religious discrimination, and (2) *Hardison* sets the precedent placing a seniority system beyond the reach of a charge of religious discrimination.<sup>109</sup> The court, however, rejected both these arguments.<sup>110</sup>

The court held that the plain language of the statute does nothing more than provide that a bona fide seniority system is lawful even if it results in discriminatory impact, as long as there is no evidence that the system was designed with the intent to discriminate.<sup>111</sup> The court noted that the statute does not expressly state that an employer who uses a seniority system to allocate privileges in the work place is exempt from the other provisions of Title VII.<sup>112</sup> In response, the City argued that the "notwithstanding" language in the seniority provision pre-empted the application of the other provisions of Title VII.<sup>113</sup> Nevertheless, the court

106. See *id.* at 1054 (stating holding of *Balint*). The result of this decision is that a bona fide seniority system does not constitute a complete defense to a charge of religious discrimination. See *id.* at 1052 ("Contrary to the City's argument, § 2000e(2)(h) is not a complete defense to Balint's religious accommodation claim.").

107. See *id.* at 1050-56 (analyzing City's argument).

108. *Id.* at 1051.

109. See *id.* (outlining City's arguments).

110. See *id.* at 1051-54 (analyzing City's arguments).

111. See *id.* at 1051 (discussing court's plain language interpretation of Title VII).

112. See *id.* ("The statute does not, however, state that employers with seniority systems are exempt from the other requirements of Title VII.").

113. See *id.* (explaining city's reliance on "notwithstanding" language of Title VII). The seniority system provision contained in 42 U.S.C. § 2000e(2)(h) states that:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . .

42 U.S.C. § 2000e(2)(h) (1994).

The Department rests its argument on the Court's decision in *Hardison*. See *Balint*, 180 F.3d at 1051 (relying on *Hardison* Court's reasoning that seniority system exempts employers from other provisions of Title VII); see also Sidney A. Ro-

rejected this argument because it interpreted the language to mean “that no other provision in Title VII can transform an otherwise valid seniority system into an illegal employment practice.”<sup>114</sup> The purpose of the seniority system provision was to guarantee that seniority systems in existence before Title VII was passed would not be declared unlawful.<sup>115</sup> The court read *Hardison* as consistent with this plain language reading of the statute.<sup>116</sup>

According to the *Balint* court, the *Hardison* decision resolves the apparent conflict between the prohibition of religious discrimination and the special treatment of seniority systems.<sup>117</sup> The *Balint* court followed the *Hardison* Court reasoning that the two provisions of Title VII are not “mutually exclusive”; instead they coexist in the statute.<sup>118</sup> This means that a bona fide seniority system is not beyond the reach of a challenge of religious discrimination.<sup>119</sup> The Supreme Court read the seniority provision as narrowing the scope of accommodation an employer must make to an employee.<sup>120</sup> The *Balint* court reasoned that if a seniority system were a complete defense to a charge of religious discrimination, then the *Hardison* Court would have ended its analysis after finding a bona fide seniority system rather than proceeding to discuss the scope of accommodation and the standard of undue hardship.<sup>121</sup> The *Balint* court concluded that

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senzweig, Comment, *Restoring Religious Freedom to the Workplace: Title VII, RFRA and Religious Accommodation*, 144 U. PA. L. REV. 2513, 2521 (1996) (stating that “notwithstanding” language exempts seniority systems from requirements of Title VII).

114. *Balint*, 180 F.3d at 1051-52.

115. *See id.* at 1051 n.6 (citing *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982) (discussing congressional intent behind seniority system)).

116. *See id.* at 1052 (noting that “Court’s decision in *Hardison* supports our interpretation of the bare language of § 2000e(2)(h)”).

117. *See id.* at 1053 (stating that Supreme Court harmonized provisions). The *Hardison* Court found that employers could satisfy the duty to reasonably accommodate an employee without violating the seniority system. *See id.* (“Since the duty to reasonably accommodate does not include violating the terms of a seniority system . . . there is no conflict between . . . the seniority system provision, and . . . the definition of religion.”).

118. *Id.*

119. *See id.* (“*Hardison* simply cannot be read for the proposition that the mere existence of a seniority system negates the duty to reasonably accommodate.”).

120. *See id.* (“The Supreme Court did not hang its decision on the invincibility of seniority systems, but merely indicated that the ‘special treatment’ of seniority systems under Title VII supported its conclusion regarding the scope of accommodation required of TWA.”).

121. *See id.* (reasoning that if seniority system were complete defense “there was no need for the Court to conduct an extended discussion of reasonable accommodation or an analysis of the undue hardship presented by accommodations which did not infringe upon TWA’s seniority system”).

the *Hardison* opinion could not be read to hold that a seniority system relieved the employer of his or her duty to accommodate an employee.<sup>122</sup>

The court accepted Balint's reading of the *Hardison* decision: that reasonable accommodation is required only when it can be made without affecting the established seniority system and without exceeding a de minimis cost to the employer.<sup>123</sup> Because the duty to accommodate is limited, there is no conflict between the two statutory provisions.<sup>124</sup> As a result, employers are not required to violate provisions in their seniority systems, but they are required to try to accommodate employees either within the seniority system or through means that are compatible with those systems.<sup>125</sup> Applying this standard to the facts of the case, the court determined that the district court's grant of summary judgment in favor of the City was only partially correct.<sup>126</sup>

### B. Examination of Grant of Summary Judgment

The court affirmed the grant of summary judgment on the City's defense that Balint's proposal of voluntary shift trades presented an undue hardship.<sup>127</sup> An undue hardship results when the employer would be forced to bear a cost greater than de minimis.<sup>128</sup> This cost can be a financial burden on the employer or a negative impact on the rest of the work force.<sup>129</sup> Although the district court limited discovery to the issue of

122. See *id.* (noting that if seniority system were absolute defense, *Hardison* Court would not have continued its analysis).

123. See *id.* ("Rather, we agree with Balint that, under the reasoning of *Hardison*, the provisions of § 2000e(2)(h) are not a defense if reasonable accommodation can be made without impact on the seniority system and with no more than de minimis cost to the city.").

124. See *id.* ("No damage is done to seniority systems by requiring reasonable accommodation of religious beliefs.").

125. See *id.* ("Employers need not transgress upon their seniority systems to make accommodations, but they are required to attempt accommodations that are consistent with their seniority systems and that impose no more than a de minimis cost.").

126. See *id.* at 1054 (stating holding of *Balint*).

127. See *id.* at 1055 ("[T]here is no genuine issue of material fact as to whether shift trades would cause the City an undue hardship.").

128. See *id.* at 1054 (explaining de minimis requirement as defined by Ninth Circuit case law).

129. See *id.* (discussing undue hardship). Ninth Circuit precedent states that the cost is greater than de minimis when the employer suffers financial detriment in the form of a loss of efficiency or increased labor costs. See *id.* (citing *Opuku-Boateng v. California*, 95 F.3d 1461, 1468 n.11 (9th Cir. 1996) (holding that "additional costs in the form of lost efficiency or higher wages" constitutes undue hardship)). Denying coworkers the privileges of seniority or forcing coworkers to bear the brunt of dangerous work conditions is also an undue hardship. See *id.* (citing *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1384 (9th Cir. 1984) ("Undue hardship may also be present when an accommodation would cause more than a de minimis impact on coworkers, such as depriving coworkers of seniority rights or causing coworkers to shoulder the plaintiff's share of potentially hazardous work.")).

whether the seniority system was a complete defense, the court reviewed the record for any basis to affirm the grant of summary judgment.<sup>130</sup>

Both the majority and the dissent relied on the depositions of two of the Department's managers for information about the hardship resulting from the proposal of trading shifts.<sup>131</sup> Trading shifts would result in both economic costs to the employer and negative impact on the other employees.<sup>132</sup> Balint refused to work on the Sabbath, Friday night, which is also the least desirable shift at the jail.<sup>133</sup> Because of an increased number of arrests on the weekends, activity at the jail is at its "dysfunctional" peak.<sup>134</sup> The Department's officers testified that covering the Friday and Saturday shifts would result in overtime costs and expenses that would put a financial strain on the Department's resources.<sup>135</sup> They also testified that shift trades would result in "logistical and personnel problems" because Balint's co-workers would be forced to bear the burden of the busiest and most difficult shifts, possibly at the cost of their seniority rights.<sup>136</sup> Balint did not offer any testimony to oppose this assertion.<sup>137</sup> The court held that there was no genuine issue of material fact concerning the undue hardship created by the proposal of shift trades, but came to the opposite conclusion regarding the issue of splitting shifts.<sup>138</sup>

The court held that the grant of summary judgment on the issue of shift splitting was not proper because there was a genuine issue of material

130. *See id.* (describing court's procedure).

131. *See id.* at 1054-56 (discussing testimony of Department's officers).

132. *See id.* at 1055 ("The testimony indicates that permanent shift trades would force the City to incur additional costs, as well as logistical and personnel problems.").

133. *See id.* ("Balint's coworkers would be forced to bear the burden of working on the busiest, most difficult shifts . . .").

134. *See id.* at 1054-55 (summarizing Department's testimony). Balint's co-workers also desired Friday and Saturday off because those days were the busiest and most difficult shifts to work. *See id.* at 1054-55 ("[T]hose days off were the most sought after by employees because of the 'additional work factors,' such as the potential of dysfunctional arrests on these shifts.") (quoting Deposition of Lt. Dimit, *Balint*, 180 F.3d 1047 (9th Cir. 1999) (No. 96-17342)).

135. *See id.* at 1055 ("[I]n order to accommodate an individual's request such as this requires significant difficulty and expense, which would tap the overall financial resources of the Department . . .").

136. *Id.* (quoting department officer's testimony about impact of trading shifts). The deputy commented that trading shifts would affect "the individuals employed in our facility and disrupt the standard operational functions of the facility." *Id.* Some employees would suffer impairment of their seniority rights. *See id.* (stating that workers' "seniority rights would be affected").

137. *See id.* ("Balint offered no contrary testimony or declarations.").

138. *See id.* (stating holding on issue of shift swapping). The proposal to split shifts means that the two days off would not be taken consecutively, but would be split up during the seven day work week. *See id.* at 1049-50 (discussing split shift proposal). The court remanded for a factual determination on the issue of splitting shifts. *See id.* at 1056 (stating holding on issue of shift-splitting). For further discussion of the court's analysis of the shift-splitting issue, see *infra* notes 158-92 and accompanying text.

fact concerning whether splitting shifts would impose an undue hardship on the Department.<sup>139</sup> In reaching this decision, the court determined that although the choice of available shifts would be affected, the seniority system, which allows senior employees to select the most desirable shifts, remains intact.<sup>140</sup> After noting that split shifts might not even prove to be an adequate accommodation for Balint, the court found the Department's testimony "speculative" and inconclusive about whether a split shift would cause undue hardship.<sup>141</sup> The dissent disagreed with the majority's position on the issue of splitting shifts.<sup>142</sup>

In contrast, the dissent concluded that the proposal for split shifts would impose undue hardship on the Department.<sup>143</sup> The uncontradicted affidavit of the Department's Chief Deputy indicated an increased cost to the Department to have someone work overtime to cover Balint's Friday and Saturday shifts.<sup>144</sup> The Chief Deputy also expressed concern about the safety risk of having officers work longer hours on the shifts with the most "dysfunctional" arrests.<sup>145</sup> The dissent gave more weight to the special treatment a seniority system should receive under the statutory scheme.<sup>146</sup> Because the seniority system provision begins with the word "notwithstanding" it should be interpreted as controlling the other language of Title VII.<sup>147</sup> Adopting the reasoning in *Hardison*, the seniority

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139. *See id.* at 1056 ("[B]ased on the limited record before this court, a genuine issue of material fact exists as to whether implementing a split shift schedule would create an undue hardship for the City.").

140. *See id.* at 1055 ("[A] split shift system would not affect the ability of more senior employees to bid for their shift preference and thus, does not create a direct conflict with the existence of the seniority system.").

141. *See id.* at 1056 n.10 ("A scheduling system which included split shifts may still not provide a permanent accommodation for Balint. . . . If, however, an employee more senior to her should bid for the split shift, Balint would be right back where she started."). The Court was not persuaded by the Department's testimony. *See id.* at 1056 ("Lieutenant Dimit's testimony as to split shifts is, at best, speculative and somewhat tangential.").

142. *See id.* at 1056 (Kleinfeld, J., dissenting). For further discussion of the dissenting opinion, see *infra* notes 143-48 and accompanying text.

143. *See id.* at 1057 (Kleinfeld, J., dissenting) ("I believe the record establishes that this accommodation would cause more than *de minimis* cost to the City, and thus, is not required.").

144. *See id.* at 1058 (Kleinfeld, J., dissenting) ("[I]t would cost the department \$6,614 per year to cover for Balint taking her Sabbath off.").

145. *See id.* (expressing concern "about increased possibility of officer burn-out and potential increased risk of injury due to the long continuous stretch of working hours").

146. *See id.* at 1057 (Kleinfeld, J., dissenting) ("[T]he majority gives too little weight to the preclusive effect a bona fide seniority system has on religious discrimination claims, and erroneously converts a *de minimis* cost standard into something more demanding.").

147. *See id.* at 1058 (Kleinfeld, J., dissenting) (discussing statutory interpretation of Title VII). Congress added the seniority system provision to protect seniority systems from the reasonable accommodation requirement of Title VII. *See id.* ("Congress trumped this provision with a 'notwithstanding' provision."). The seniority system provision controls the interpretation of the statute. *See id.* ("Choosing

provision trumps the religious discrimination provision because it appears in the operational language of the statute rather than the definitional language.<sup>148</sup>

## V. CRITICAL ANALYSIS

Although the *Balint* court correctly interpreted Title VII and the *Hardison* decision to reject a seniority system as a complete defense to a claim of religious discrimination, it incorrectly applied the de minimis and undue hardship standards to the facts of the case.<sup>149</sup> The dissent made a strong argument that the special treatment afforded seniority systems, contained in the operational language of Title VII, should trump the religion provision contained in the definition section.<sup>150</sup> Nonetheless, the case law on the issue does not entirely support the dissent's view.<sup>151</sup> In *Mann*, the Eighth Circuit referred to the substantial deference that should be given to a seniority system.<sup>152</sup> Despite this deference, the *Mann* court pro-

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which provision controls if there is a conflict is easy. Congress wrote that the seniority provision controls '[n]otwithstanding any other provision of this subchapter,' 42 U.S.C. § 2000e(2)(h), which includes the religious accommodation language."); see also Silbiger, *supra* note 28, at 847 ("Of the two principal holdings of *Hardison*, only one has carried a clear message to the circuits: the dominance of seniority over religious accommodation.").

148. See *Balint*, 180 F.3d at 1059 (Kleinfeld, J., dissenting) ("The Court explained that the accommodation language was found in the definitions section of the statute, but the seniority provision was in the operational language, stating what an employer could not do."). The *Hardison* Court considered the placement important in the interpretation of the statute. See *id.* ("The 'unmistakable purpose' of the seniority language was to 'make clear that the routine application of a bona fide seniority system would not be unlawful.'") (quoting *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 82 (1977)).

149. See *Balint*, 180 F.3d at 1056 (Kleinfeld, J., dissenting) ("I agree with the majority on the law, but disagree on the application of law to fact that results in a remand."). The dissent criticized the majority for applying the de minimis standard too rigorously. See *id.* at 1057 (Kleinfeld, J., dissenting) (stating that majority "erroneously converts a *de minimis* cost standard into something more demanding"). The standard established in *Hardison* is a low threshold. See David L. Gregory, *Religious Harassment in the Workplace: An Analysis of the EEOC's Proposed Guidelines*, 56 MONT. L. REV. 119, 127 (1995) ("The Title VII requirement that the secular employer reasonably accommodate the religious practices of the employee has been utterly minimized by the Court."). The undue hardship standard set in *Hardison* is so low that it offers no practical protection for employees seeking to exercise religious beliefs. See *id.* (arguing that Title VII is "largely meaningless as a source of protection for the religiously observant employee").

150. See *Balint*, 180 F.3d at 1058-59 (Kleinfeld, J., dissenting) (reasoning that intent of Congress was that seniority system provision would control religious accommodation provision). For further discussion of the dissent's reasoning, see *supra* note 149 and accompanying text.

151. For further discussion of the case law on the interpretation of the statute, see *infra* notes 152-58 and accompanying text.

152. *Mann v. Frank*, 7 F.3d 1365, 1369 (8th Cir. 1993) ("[T]he seniority system and the voluntary ODL [overtime assignment list] in the collective bargaining agreement themselves represented significant accommodations to Mann's religious needs.").

ceeded with the analysis of the undue hardship question.<sup>153</sup> As the majority in *Balint* pointed out, if the existence of a seniority system were a complete defense to a charge of religious discrimination, the inquiry would end after determining that the employer had a bona fide seniority system.<sup>154</sup> In fact, the opposite is true: since the *Hardison* decision, many cases have been brought before the courts and they have routinely proceeded to analyze the duty to accommodate despite first finding a bona fide seniority system.<sup>155</sup> Courts regularly decide religious discrimination cases under Title VII by assessing the amount of hardship placed on the employer.<sup>156</sup> The court in *Balint* was correct in examining whether the Department was required to accommodate the employee, but incorrectly applied the undue hardship requirement.<sup>157</sup>

The City had to show that accommodating Balint caused an actual hardship that was greater than de minimis.<sup>158</sup> The majority in *Balint* dismissed the Department's claim that splitting shifts would cause undue hardship, stating that the claim was merely "speculative."<sup>159</sup> In *Anderson*, the Ninth Circuit defined undue hardship as requiring more than a conclusion based on speculation.<sup>160</sup> For support, the *Anderson* court cited *Draper v. United States Pipe & Foundry Co.*<sup>161</sup> The *Draper* court expressed

153. See *id.* at 1369-70 (analyzing undue hardship requirement).

154. See *Balint*, 180 F.3d at 1053 ("If that were so, there was no need for the Court to conduct an extended discussion of reasonable accommodation or an analysis of the undue hardship presented by accommodations which did not infringe upon TWA's seniority system."). The department's reading of *Hardison* focuses on a small portion of the opinion while ignoring the bulk of the Court's analysis. See *id.* ("[T]he City would have this court read the two pages of *Hardison* which discuss the 'special treatment' of seniority systems in a vacuum and ignore the twelve pages of the opinion which discuss reasonable accommodation and undue hardship.").

155. See *Seniority Systems Do Not Excuse Employers from Accommodating Sabbath Observers*, U.S. NEWswire, Oct. 30, 1998, available in 1998 WL 13606991 (arguing that "given the hundreds of cases over the past 25 years in which the bare existence of a seniority system was not used to trump the duty to accommodate Title VII," courts should know that conflicts "are routinely resolved on the assumption that Title VII requires such accommodation").

156. See *id.* (concluding that courts have not given preclusive effect to seniority system).

157. See *Balint*, 180 F.3d at 1056-57 (Kleinfeld, J., dissenting) (alleging majority erroneously applied de minimis standard). For further discussion of criticism of the *Balint* majority opinion, see *infra* notes 158-92 and accompanying text.

158. See Cacy, *supra* note 8, at 590 (noting that "most courts have required actual proof of a *present* hardship—not simply speculation as to a future cost—to satisfy the employer's burden").

159. See *Balint*, 180 F.3d at 1056 (describing department's testimony as "speculative and somewhat tangential").

160. See 589 F.2d 397, 402 (9th Cir. 1978) ("Undue hardship means something greater than hardship. Undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts.").

161. See generally *Anderson v. General Dynamic Convair Aerospace Div.*, 527 F.2d 515 (6th Cir. 1975). *Draper* involved a religious discrimination charge by an electrician working at a plant that operated 24 hours a day. See *id.* at 517-18 (stat-

concerns about employer assumptions; the court also stated that "it is possible for an employer to prove undue hardship without actually having undertaken any of the possible accommodations."<sup>162</sup> The Department did not take any steps to accommodate Balint, but this should not be conclusive in determining whether the employer faced an undue hardship.<sup>163</sup>

The majority in *Balint* erred in determining that a genuine issue of fact remained as to whether the proposal of split shifts would cause an undue hardship.<sup>164</sup> The Department submitted an affidavit estimating that it would cost over \$6000 to cover Balint's Friday and Saturday shifts.<sup>165</sup> This figure is not speculative; it is based on the cost of paying a replacement worker his or her higher overtime wage.<sup>166</sup> As the dissent pointed out, this "evidence is uncontradicted and establishes more than a de minimis cost."<sup>167</sup> The Department also suggested that splitting shifts raised safety concerns.<sup>168</sup>

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ing facts). Draper's position was necessary to maintain proper functioning of the plant. *See id.* (discussing nature of Draper's position).

162. *Id.* at 520.

163. *See id.* (stating fact that employer's failure to accommodate is not dispositive on undue hardship issue); *see also* *Turpen v. Missouri-Kansas-Texas R.R. Co.*, 736 F.2d 1022, 1027 (5th Cir. 1984) (holding that supervisor's one and a half hour attempt to rearrange worker's schedule met requirement of reasonable accommodation). The employer in *Turpen*, like the City in *Balint*, conducted business 24 hours a day. *See id.* at 1024 (discussing nature of employer's business). The employee's suggested methods of accommodation would negatively impact the employer's business. *See id.* at 1028 n.6 ("The only proposed alternative schedule presented would have severely decreased the efficiency of M-K-T's operation at the Peach Yard and adversely affected interstate commerce."). The court held that the employer had satisfied the reasonable accommodation requirement. *See id.* at 1028 (stating that district court's finding that accommodation would amount to undue hardship was not clearly erroneous).

164. *See Balint*, 180 F.3d at 1056 (Kleinfeld, J., dissenting) (stating majority erred in application of undue hardship standard). For further discussion of the majority's incorrect application of the undue hardship standard, *see supra* note 149 and accompanying text.

165. *See Balint*, 180 F.3d at 1058 (Kleinfeld, J., dissenting) (discussing Department's testimony concerning costs of accommodation).

166. *See id.* (Kleinfeld, J., dissenting) ("His calculation is based on the assumption that she would have to be replaced by a senior person for eight hours every week, who would then get overtime.").

167. *Id.*

168. *See id.* at 1056 (Kleinfeld, J., dissenting) (stating that "employee could end up working eighty-eight hours in a two week period"). Splitting shifts might contravene the Department's contract with the city. *See id.* at 1057 (Kleinfeld, J., dissenting) (stating that contract limits work to 40 hours per week). Working more than 40 hours in a week also creates a safety risk for the Department. *See id.* at 1058 (Kleinfeld, J., dissenting) (discussing deputy's concern about officer "injury due to the long continuous stretch of working hours"). The seniority system was designed to give employees two consecutive days off to make sure they are adequately rested. *See Balint v. Carson City*, 144 F.3d 1225, 1228 (9th Cir. 1998) (stating that system was designed to "ensur[e] that each officer had two consecutive days off for adequate rest"), *rev'd on other grounds*, 180 F.3d 1047 (9th Cir. 1999).



When the proposed accommodation raises safety concerns, as in *Balint*, the employer deserves more latitude in resolving scheduling conflicts.<sup>169</sup> In *Blair v. Graham Correctional Center*,<sup>170</sup> a case on point with *Balint*, the court affirmed summary judgment for a prison that would not accommodate an employee's request to arrange his schedule around the Sabbath, which he observed from Friday sundown to Saturday sundown.<sup>171</sup> The court gave great weight to the safety concerns surrounding the "demands of managing the security force of a prison."<sup>172</sup> Although the jail in *Balint* is a city jail rather than a maximum security prison, the uncontradicted testimony of the Department stressed the "risk of injury due to the long continuous stretch of working hours."<sup>173</sup> Requiring an employee to work overtime on the nights of the week with the most "dysfunctional" arrests presents a safety concern that the *Balint* majority did not address.<sup>174</sup>

In addition, the majority opinion in *Balint* is inconsistent.<sup>175</sup> For example, the majority gave weight to the Department's testimony that shift trades created the potential for personnel and logistical problems, but it does not give effect to the potential personnel and logistical problems created by splitting shifts.<sup>176</sup> Splitting shifts creates difficulty when determining how to define the work week for the purposes of overtime computation;<sup>177</sup> it forces the Department to undertake significant trouble to change its long-established seniority system.<sup>178</sup> The split shift proposal

169. See Cacy, *supra* note 8, at 588 ("[I]f accommodating an employee would create danger to the public or other employees, the courts do not require the employer to compromise safety considerations to accommodate an employee."); see also *United States v. City of Albuquerque*, 545 F.2d 110, 114 (10th Cir. 1976) (stating that "when the 'business' of an employer is protecting the lives and property of a dependent citizenry, courts should go slow in restructuring his employment practices").

170. No. 92-1597, 1993 U.S. App. LEXIS 23051, \*1 (7th Cir. 1993).

171. See *id.* at \*9 (stating holding of court).

172. *Id.* It is difficult to balance the staffing needs of the security force of a prison with the religious needs of an employee. See *id.* at \*9 (comparing staffing needs of prison security force to paramilitary organization).

173. *Balint*, 180 F.3d at 1058 (Kleinfeld, J., dissenting).

174. See *id.* at 1057-58 (Kleinfeld, J., dissenting) (discussing ramifications of shift-splitting proposal).

175. For further discussion of the inconsistencies in the majority opinion in *Balint*, see *infra* notes 176-79 and accompanying text.

176. See *Balint*, 180 F.3d at 1056 ("His testimony simply does not show anything material about split shifts.").

177. See *id.* at 1057 (Kleinfeld, J., dissenting) (stating that department "expected to run into problems with overtime").

178. See *id.* at 1058 (Kleinfeld, J., dissenting) (stating that splitting shifts "generates a great deal of trouble, risk and possible expense"). But see 29 C.F.R. § 1605.2(e)(1) (1980) (stating that administrative costs do not amount to more than de minimis cost for purposes of Title VII analysis).

also infringes on the seniority rights of the Department's other employees.<sup>179</sup>

The majority's decision also contravenes the holding in *Hardison* by suggesting that the employer accommodate one employee at the cost of another employee's rights.<sup>180</sup> The Department has never implemented a split shift, which means that no employee has ever been forced to split his or her days off.<sup>181</sup> The majority suggested that the Department could create two split shifts; this would result in at least one employee, with more seniority than Balint, being forced to take nonconsecutive days off.<sup>182</sup> Forcing an employee to relinquish a condition of employment interferes with his or her seniority rights.<sup>183</sup> Title VII does not require an employer to "deny the shift and job preference of some employees . . . in order to accommodate or prefer the religious needs of others."<sup>184</sup> In order to give Balint her Sabbath off, the majority would require another employee to give up the established two consecutive days off.<sup>185</sup> The Department should not be "required to carve out a special exception to its seniority system" to help one employee meet his or her religious obligations.<sup>186</sup>

The majority stated that implementing split shifts does not affect the seniority system because it still allows the employees to choose, albeit from different, perhaps less desirable, choices.<sup>187</sup> If the Department were to accept the majority's proposal of establishing two split shifts, at least one employee would be forced to work a shift that did not exist when he or she joined the Department.<sup>188</sup> This employee, who stands one rung higher

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179. See *Balint*, 180 F.3d at 1057 (Kleinfeld, J., dissenting) (noting that "splitting days off as Balint proposed would conflict with the established seniority system").

180. See *id.* at 1060 (Kleinfeld, J., dissenting) (discussing tension created by requiring Balint's coworkers to adjust their schedules to accommodate her needs).

181. See *id.* at 1057 (Kleinfeld, J., dissenting) (discussing employment practices of department).

182. See *id.* at 1055 (studying majority's proposal of two split shifts).

183. See *id.* at 1057 (Kleinfeld, J., dissenting) (concluding Balint's proposal "would conflict with the established seniority system"). The seniority system currently in effect requires the employees to bid for shifts every six months. See *id.* at 1050 (describing seniority system). An employee must bid on a shift different from the one that he or she is currently working. See *id.* It is likely that a different employee will end up working the split shift during the next six-month period. See *id.* Implementing the split shift system also forces a more senior employee to work some of the least desirable shifts. See *Balint v. Carson City*, 144 F.3d 1225, 1229 (9th Cir. 1998) (stating that Balint's proposal "requires the Department to bypass its existing seniority system—forcing a more senior person to work during four of the most undesirable shifts during the week"), *rev'd*, 180 F.3d 1047 (9th Cir. 1999).

184. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 81 (1977).

185. See *Balint*, 180 F.3d at 1060 (Kleinfeld, J., dissenting) (discussing possibility of finding someone to split shifts).

186. *Hardison*, 432 U.S. at 83.

187. See *Balint*, 180 F.3d at 1055 (stating that shift splitting affects shifts available for employee bidding).

188. See *id.* at 1057 (Kleinfeld, J., dissenting) (noting that department had lengthy history of giving employees two consecutive days off).

on the seniority ladder than Balint, would not have any choice; he or she would be forced to work a shift that denied him or her the established two consecutive days off.<sup>189</sup> That employee is denied a longstanding condition of employment partly because he or she does not hold a religious belief that requires observance of the Friday sundown to Saturday sundown Sabbath.<sup>190</sup> Title VII protects followers of all religions; it does not require an employer to discriminate against a member of a majority religion in order to accommodate a member of a minority religion.<sup>191</sup> The *Hardison* Court chose to construe the accommodation provision of Title VII narrowly to avoid creating a broad duty to accommodate that would result in preferences for some employees based on their religion.<sup>192</sup>

The duty to accommodate an employee's religious beliefs becomes unconstitutional when one employee is denied rights because the employer is accommodating another employee's religious beliefs.<sup>193</sup> Title VII is constitutional because it weighs the rights and needs of employers and employees.<sup>194</sup> Nonetheless, when the application of the statute tips the scales too far toward accommodating one employee at the cost of another, "[r]eligious accommodation becomes religious discrimination."<sup>195</sup> The majority in *Balint* required the employer to endure "considerable ad-

189. See *id.* (Kleinfeld, J., dissenting) (stating that splitting shifts would conflict with long-standing seniority system).

190. See *Hardison*, 432 U.S. at 81 (stating that employee forced to cover shift for coworker observing his Sabbath was denied his shift preference "at least in part" because of his religion).

191. See *id.* at 85 ("In the absence of clear statutory language or legislative history to the contrary, we will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath."). Religious "discrimination is proscribed when it is directed against majorities as well as minorities." *Id.* at 81.

192. See Zerangue, *supra* note 6, at 1285 (noting Court's desire to comply with First Amendment).

193. See *Balint*, 180 F.3d at 1059-60 (Kleinfeld, J., dissenting) (expressing concern that broad scope of duty to accommodate would result in discrimination against other employees). The Court in *Hardison* interpreted Title VII in a way that would not contradict the Constitution. See Zerangue, *supra* note 6, at 1285 ("The majority chose narrow construction since requiring religious preferences would have raised serious constitutional questions.").

194. See Zerangue, *supra* note 6, at 1282 (concluding that Title VII is constitutional because of weighing process used to determine accommodation requirement); see also *Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 136-37 (3d Cir. 1986) (discussing constitutionality of Title VII). Title VII is constitutional because it "calls for reasonable rather than absolute accommodation." *Id.* at 136 (quoting *Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (O'Connor, J., concurring)).

195. *Balint*, 180 F.3d at 1059 (Kleinfeld, J., dissenting). Justice Kleinfeld stated:

I can think of few Establishment Clause issues that would matter more to people than whether the government makes them work overtime or during a shift when they want to be home with their families, because someone more religious, or with a different religion, wants to take the time off for religious purposes.

*Id.* at 1059-60 (Kleinfeld, J., dissenting).

ministrative effort and potential overtime expense" that exceeds the de minimis threshold.<sup>196</sup>

The *Balint* decision affirms the tendency of the courts to look favorably upon employers who attempt to accommodate an employee's needs.<sup>197</sup> Aside from the neutral shift-bidding system, the employer in *Balint* made no effort to accommodate the needs of its employee.<sup>198</sup> The court followed the trend of disfavoring an employer who is unwilling to attempt to accommodate an employee.<sup>199</sup> Although the court accepted the employer's assessment of one proposed accommodation, it rejected the assessment of the second proposed accommodation, even though it was based on the same uncontradicted testimony from the Department's officers in charge of arranging Balint's schedule.<sup>200</sup>

## VI. IMPACT

The *Balint* decision has the potential to alter the landscape of Title VII religious discrimination charges both in the workplace and in the courtroom.<sup>201</sup> This decision is another in the line of pro-employee decisions handed down since the Supreme Court's opinion in *Hardison*.<sup>202</sup> The *Hardison* decision was construed by some to imply the absolute superiority of a seniority system over a challenge of religious discrimination.<sup>203</sup> Even if not interpreted as establishing a seniority system as an absolute defense, the Court set a low threshold for showing undue hardship by

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196. *Id.* at 1060 (Kleinfeld, J., dissenting).

197. See *Cacy*, *supra* note 8, at 589 ("[E]mployers who go to great lengths to help an employee arrange alternative shifts, for example, are considered in a more favorable light."); see also *Beadle v. Hillsborough County Sheriff's Dept.*, 29 F.3d 589, 593 (11th Cir. 1994) (finding that employer met reasonable accommodation requirement by assisting employee in attempt to arrange shift swap).

198. See *Balint*, 180 F.3d at 1051 ("The city has also conceded that it took no steps to accommodate Balint's request for observance of her Sabbath.").

199. See *Cacy*, *supra* note 8, at 588 (noting tendency of courts to rule against employers who do not attempt accommodation). An employer is in an even weaker position when he or she tries a suggested method of accommodation and does not experience any hardship. See *Brown v. General Motors Corp.*, 601 F.2d 956, 960 (8th Cir. 1979) ("If an employer stands on weak ground when advancing hypothetical hardships in a factual vacuum, then surely his footing is even more precarious when the proposed accommodation has been tried and the postulated hardship did not arise.").

200. See *Balint*, 180 F.3d at 1056 (stating holding of *Balint* majority).

201. For further discussion of potential effect of the *Balint* decision, see *infra* notes 202-20 and accompanying text.

202. See *McIntosh*, *supra* note 12, at 353 (suggesting trend toward pro-plaintiff decisions in religious discrimination charges).

203. See *Silbiger*, *supra* note 28, at 845 (stating that *Hardison* Court "concluded that seniority was an untouchable area that does not have to yield to religious accommodation unless it has been deliberately used to violate the anti-discrimination provisions of the statute").

stating that “any spending” is undue.<sup>204</sup> The *Balint* decision raises that threshold.<sup>205</sup> The decision in *Balint* stated that an employer must make accommodations that are consistent with the seniority system.<sup>206</sup> Employers can no longer “hide behind a seniority system to avoid complying with a request” for an accommodation of an employee’s religious beliefs.<sup>207</sup> Nonetheless, when the employer attempts to accommodate, he or she will run the risk of creating more tension in the work place.<sup>208</sup>

The court’s suggestion that the employer could institute two split shifts, resulting in a more senior employee splitting his or her days off, will create tension between employees.<sup>209</sup> The court’s decision forces the City to give special attention to some employees strictly on the basis of their religion.<sup>210</sup> When an employee is forced to work one of the new split shifts created to accommodate Balint’s religious beliefs, that employee is likely to resent Balint, her religion and the Department.<sup>211</sup> Far from encouraging religious tolerance, this proposal will foster animosity amongst coworkers.<sup>212</sup> Depriving one worker of a former benefit of employment, such as having two consecutive days off, raises the issue of reverse discrimination in contravention of the Establishment Clause of the First Amend-

204. See *id.* at 855 (stating that following literal interpretation of de minimis standard, as defined in *Hardison*, results in extreme result that “[a]ny cost, even to a very large employer, is likely to be deemed to be an undue hardship”); see also *United States v. Board of Educ. for Sch. Dist. of Phil.*, 911 F.2d 882, 890 (3d Cir. 1990) (“The Supreme Court’s opinion in *Hardison* strongly suggests that the undue hardship test is not a difficult threshold to pass. . . .”).

205. See *Balint*, 180 F.3d at 1060 (Kleinfeld, J., dissenting) (stating that accommodation would be greater than de minimis).

206. See *id.* at 1056 (stating holding of *Balint* court).

207. Fischer, *supra* note 13, at 1.

208. See *Balint*, 180 F.3d at 1060 (Kleinfeld, J., dissenting) (stating that requiring more effort by employer on behalf of employee because of his or her religion “strain[s] toleration”).

209. See *id.* (Kleinfeld, J., dissenting) (discussing strain on toleration caused by requiring extensive accommodation of one employee’s needs).

210. See *id.* (Kleinfeld, J., dissenting) (stating that decision “requires significantly more expense and trouble to be undertaken in the workplace for some people than others, on account of their religions”). Title VII does not require better treatment of some employees due to their religious beliefs. See *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981) (“The religious accommodation provisions do not authorize preferential treatment of employees.”).

211. See *Balint*, 180 F.3d at 1060 (Kleinfeld, J., dissenting) (noting strain created by requiring another employee to work undesired shift). Another employee may wish to have a shift off to spend time with his or her family, but may be denied that shift preference because another employee is already taking that day off for religious purposes. See *id.* at 1059-60 (Kleinfeld, J., dissenting) (arguing that granting day off for religious but not secular reason creates tension in workplace). For further discussion of potential workplace tension, see *supra* note 195 and accompanying text.

212. See *Balint*, 180 F.3d at 1060 (Kleinfeld, J., dissenting) (noting negative effects of requiring accommodation of one employee at cost to others).

ment.<sup>213</sup> In addition to the potentially negative effect on the workplace, the *Balint* decision may make it harder for an employer to defend against a charge of religious discrimination.<sup>214</sup>

The *Balint* decision will have practical consequences for the employer, the employee and the courts.<sup>215</sup> The decision puts employers on notice that they should make at least some effort to accommodate the religious needs of their employees.<sup>216</sup> The *Balint* court noted that the Department did not take any steps to accommodate the employee's religious beliefs.<sup>217</sup> The court then applied a high standard of undue hardship to the facts of the case.<sup>218</sup> Employers should be aware that a court is likely to require some attempt at accommodation and be prepared to cooperate with the employee in attempting to solve the conflict.<sup>219</sup> The most probable effect of the *Balint* decision on employees is that more employees will win their claims of religious discrimination. The impact in the courts depends on whether judges interpret *Balint* broadly or narrowly.<sup>220</sup> Regard-

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213. See *id.* (Kleinfeld, J., dissenting) (concluding that "even if the jail could find someone to split their weekend into noncontiguous days off and work the undesirable weekend time Balint needed for her Sabbath, looking for that person . . . would conflict with the well-established neutral seniority system").

214. For further discussion of possible difficulty of defending against a charge of religious discrimination, see *infra* note 220 and accompanying text.

215. For further discussion of consequences arising from the *Balint* decision, see *infra* notes 216-20 and accompanying text.

216. See *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1440 (9th Cir. 1993) (placing responsibility on employer to make preliminary effort at accommodation); see also *Cacy*, *supra* note 8, at 588-89 (stating that courts view employers who attempt accommodation more favorably than employers who do not); *Engle*, *supra* note 30, at 388 (concluding employees "consistently win" cases involving religious discrimination charges in which employer makes no attempt to accommodate). The "bottom line" for employers is that they must present proof that they have reasonably attempted to accommodate the employee. See Amy G. Self, *Ninth Circuit Comments on Your Duty to Accommodate Religious Beliefs*, 4 PAC. EMPLOYMENT L. LETTER, No. 3 (Sept. 1999) ("Federal courts under the jurisdiction of the Ninth Circuit will not excuse you from your duty to reasonably accommodate an employee's religious practices based solely on an assertion that the requested accommodation conflicts with union procedures or a collective bargaining agreement."). The employer should be prepared with evidence of proposals that would allow the employee to observe his or her religious beliefs and evidence of undue hardship the employer would incur as a result of accommodation. See *id.* (advising employer to document all efforts at accommodation).

217. See *Balint*, 180 F.3d at 1051 ("The City has also conceded that it took no steps to accommodate Balint's request for observance of her Sabbath.").

218. See *id.* at 1060 (Kleinfeld, J., dissenting) (concluding that cost of accommodating Balint would be greater than de minimis).

219. See *Cacy*, *supra* note 8, at 588-89 (stating that employers who make accommodation such as arranging "alternative shifts, for example, are considered in a more favorable light").

220. If a court gives *Balint* a broad reading, then it would require a higher level of hardship to meet the de minimis threshold. See *Balint*, 180 F.3d at 1060 (Kleinfeld, J., dissenting) (stating that cost of accommodating Balint was greater than de minimis). If a court reads *Balint* narrowly, then it would require a greater showing of undue hardship only in cases where the employer attempted no accom-

less of the approach taken by the courts, predicting the outcome of a case involving the scope of an employer's duty to accommodate an employee's religious beliefs is a fact-sensitive task that will be difficult to accomplish.

*Polly Hayes*

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modation at all. *See* EEOC v. Hacienda Hotel, 881 F.2d 1504, 1512 (9th Cir. 1989) (noting that analysis of undue hardship arises after employer refuses to accommodate employee); *see also* Bedig, *supra* note 4, at 267-68 ("Only if no accommodation was offered by the employer, does the employer have the burden of proving that any reasonable accommodation would impose more than undue hardship on the conduct of its business.").